IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 651

MARYLAND CASUALTY COMPANY,
(A Corporation),
Petitioner,

vs.

OLIVE RAY TOUPS,
individually and as next friend of
HELENA ESTELLE TOUPS and JOHN HENRY TOUPS,
Minors, and
HELENA ESTELLE TOUPS and JOHN HENRY TOUPS,
Minors,
Respondents,

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROSZEL C. THOMSEN,
Counsel for Petitioner,
1914 O'Sullivan Building,
Baltimore 2, Maryland.

CHARLES S. PIPKIN,
Beaumont, Texas,
Of Counsel.

The Daily Record Co., Baltimore 3, Md.

INDEX

TABLE OF CASES AND STATUTES CITED

STATUTES

CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ------

MARYLAND CASUALTY COMPANY,
(A Corporation),

Petitioner,

vs.

OLIVE RAY TOUPS,
individually and as next friend of
HELENA ESTELLE TOUPS and JOHN HENRY TOUPS,
Minors, and
HELENA ESTELLE TOUPS and JOHN HENRY TOUPS,
Minors,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May it please the Court:

The petition of Maryland Casualty Company respectfully shows to this Honorable Court:

A.

THE QUESTION PRESENTED BY THIS PETITION

Is the remedy against the employer for the death of a seaman, whose contract of employment and work are mari-

time, and who is drowned in the course of his employment, within the exclusive admiralty or maritime jurisdiction?

In other words, did the Courts below err in applying the Workmen's Compensation Law of the State of Texas in this case, and in entering and sustaining a judgment based upon that State law?

B.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The following statement of the essential facts is taken verbatim from the opinion of the Court of Appeals for the Fifth Circuit (R. 285). Record references have been interpolated into the quotation.

> "Clifton James Toups was both captain and crew of the 46-foot vessel, 'Relief No. 1', of the Sabine Pilots Association (R. 89). That association was engaged in supplying pilots to seagoing vessels that came into, and went out of, Port Arthur, Texas, through the waterways of Sabine Pass and Tributaries, and in furtherance of its business maintained, used, and operated certain docks and shore installations (R. 81, 82, 89). Toups was not one of the pilots of large seagoing ships but only of 'Relief No. 1' with which he took pilots out to meet the ships when they came in and brought them back when their pilotage had ended and their nautical charges had nosed out into the open sea (R. 83). In addition to navigating and keeping up the 'Relief No. 1', Toups sometimes served as engineer on one of the association's larger vessels (R. 90). But on the 17th day of October, 1946, while 'Relief No. 1' was undergoing some repairs, her skipper, under orders of his employer, was on a small dock of the association engaged in making fenders to hang over the side of his craft to cushion her against buffeting by the wharves and the big ships when she came alongside (R. 88, 106, 107).

"A witness some 150 feet away saw Toups moving up and down the dock, shortly thereafter heard a splash, and saw Toups in the channel floundering and struggling to grasp a ladder that reached from the water to the deck of the dock. The struggle was futile. The witness hastened to the scene but reached it barely in time to see Toups' finger tips as he sank beneath the water from which he was later taken as a corpse (R. 109-111)." (R. 285-6).

Maryland Casualty Company had issued to Sabine Pilots a policy providing Workmen's Compensation Insurance under the Statutes of Texas (R. 249). It also covered the liability of Sabine Pilots under the Longshoremen's and Harbor Workers' Compensation Act and under the Jones Act (R. 251, 263). An award of compensation was made to Mrs. Toups and her children by the Industrial Board of Texas under the Texas Workmen's Compensation Law (R. 4). Maryland Casualty Company filed suit in the District Court of the United States for the Eastern District of Texas to set aside that award (R. 4). Jurisdiction of the District Court was based on diversity of citizenship. The Defendants in said suit filed an answer and cross-complaint (R. 5) in which they prayed judgment against Maryland Casualty Company for 360 weeks compensation at $20 per week, in a lump sum, with costs.

Maryland Casualty Company defended the cross-complaint on a number of grounds, the only one relevant to this petition being that the District Court had no jurisdiction to render a judgment based upon the Workmen's Compensation Law of the State of Texas, because Toups' contract of employment and work (including the work that he was doing at the time of his death) were maritime in their nature, and that he died in the navigable waters of the United States; and therefore, any action for his death lies exclusively within the admiralty jurisdiction of the United

States. (See Motion for Instructed Verdict, R. 45; and Motion to Set Aside Judgment, etc., R. 67, which motions were overruled, R. 58, 275.) The Jury answered certain special issues (R. 52-57) following "statements by the trial Judge that were tantamount to directed verdict on those issues" (Opinion of Court of Appeals, R. 288) and Judgment was entered for Cross-Plaintiffs (R. 59).

From that judgment Maryland Casualty Company appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the Judgment (R. 296) with an opinion by Circuit Judge Waller (R. 285 et seq.) who said (R. 292):

> "The deceased, under the holdings of the Supreme Court in Norton v. Warner, 321 U. S. 536, was, no doubt, a seaman on a vessel engaged in navigation and in aid of navigation, whose heirs, in the absence of an applicable State Workmen's Compensation Act, would be remitted to the Jones Act for redress. But since an action under the Jones Act must be grounded upon negligence, and since in the present case no negligence of the employer can be shown, the heirs of the deceased would be without remedy under that Act or in admiralty, and the Workmen's Compensation Act affords the exclusive remedy of the heirs against the employer of the deceased under the law of Texas. Such a result is not imperative unless the invocation of the State Compensation Act would 'interfere with the proper harmony or uniformity of that law (admiralty) in its international or interstate relations.' No inharmonious result is here possible."

We respectfully submit that the application of the State Compensation Act to a seaman, under the facts of this case, does interfere with the proper harmony and uniformity of the admiralty law, and is in conflict with recent opinions of this Honorable Court and of the United States Court of Appeals for the First Circuit.

C.

JURISDICTION

1. The statutory provisions believed to sustain the jurisdiction of this Court are Sections 1254 and 2101 (c) of Title 28, United States Code (Chapter 646—Public Law 773—approved June 25, 1948).

2. The date of the judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is February 1, 1949 (R. 296). The opinion will be reported in ..... F. 2d. .... and appears on pages 285 to 295 of the Record.

3. The case involves the applicability under the facts set out above of the Texas Workmen's Compensation Law (Title 130 Revised Civil Statutes of the State of Texas), and particularly Article 8309, Section 1 thereof, which provides:

> " 'Employee' shall mean every person in the service of another under any contract of hire, expressed or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of a trade, business, profession or occupation of his employer * * *."

The exclusive admiralty or maritime jurisdiction is not limited to interstate and foreign commerce.

> Article 3 Section 2 of the Constitution;
> *London Guaranty and Accident Co. v. Industrial Accident Commission*, 279 U. S. 109 at 124.

Petitioner contends that the case is governed by the provisions of Article 3 Section 2 of the Constitution of the United States, which prevent the application of state laws in such a way as to interfere with the harmony and uniformity of the admiralty law. The application of state compensation laws to seamen does so interfere.

The Merchant Marine Act (June 5, 1920) 41 Stat 988, 1007 C 250, 46 U. S. C. A. Sec. 688 (the Jones Act)—adopted by Congress in the exercise of its paramount authority in reference to the maritime law—establishes a rule of general application in reference to the liability of employers for injuries to seamen extending territorially as far as Congress can make it go. That act operates uniformly within all of the states and is as comprehensive of those instances in which it excludes liability as of those in which liability is imposed; and, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.

Lindgren v. U. S., 281 U. S. 38 at 46;
Northern Coal and Dock Co. v. Strand, 278 U. S. 142 at 147.

4. The question involved is substantial and important because although a "twilight zone" has been recognized between the Longshoremen's and Harbor Worker's Compensation Act and state compensation acts in connection with certain types of maritime workers, no such "twilight zone" exists in the case of seamen. This Court has consistently refused to apply state Workmen's Compensation Laws to seamen when injured in the course of their maritime employment.

5. Cases in this Court in conflict with the decision of the Court of Appeals herein:

London Guaranty & Accident Co. v. Industrial Accident Commission, 279 U. S. 109;
Norton v. Warner Company, 321 U. S. 565;
O'Donnell v. Great Lakes Dredge and Dock Co., 318 U. S. 36;
Warner v. Goltra, 293 U. S. 155;
Northern Coal and Dock Co. v. Strand, 278 U. S. 142.

6. Case in the United States Court of Appeals for the first Circuit in conflict with the Court of Appeals herein:

Gahagan Construction Corp. v. Armao, 165, F. 2d 301, cert. den. 333 U. S. 876.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Because the decision of the Court of Appeals in this case disturbs the uniformity of the maritime law dealing with seamen.

2. Because said decision of the Court of Appeals is in conflict with the following applicable decisions of this Court on an important question of admiralty jurisdiction:

London Guaranty & Accident Co. v. Industrial Accident Commission, 279 U. S. 109;
Norton v. Warner Company, 321 U. S. 565;
O'Donnell v. Great Lakes Dredge and Dock Co., 318 U. S. 36;
Warner v. Goltra, 293 U. S. 155;
Northern Coal and Dock Co. v. Strand, 278 U. S. 142;

3. Because said decision of the Court of Appeals in this case is in conflict with the following decision of another Circuit on the same point:

Gahagan Construction Corp. v. Armao, 165 F. 2d 301, cert. den. 333 U. S. 876.

4. Because the District Court erred in refusing an instructed verdict in favor of Petitioner and in entering judgment for Respondents herein, and the Court of Appeals erred in affirming said judgment.

5. Because although this Court has recognized a "twilight zone" between the Longshoremen's and Harbor Workers' Compensation Act and State Compensation Acts in connection with certain types of maritime workers, this Court has never recognized such a "twilight zone" in the case of seamen. This Court has been zealous to preserve to seamen the benefits of the Jones Act and other exclusive features of the general maritime jurisdiction, and has consistently refused to apply state laws to injuries to seamen but has insisted upon the application of the Jones Act and other characteristic features of the maritime law, even when the accident occurs on land.

Norton v. Warner Company, 321 U. S. 565;
O'Donnell v. Great Lakes Dredge and Dock Co., 318 U. S. 36;
Aguilar v. Standard Oil Company, 318 U. S. 724;
Swanson v. Marra Bros., 328 U. S. 1;
London Guaranty & Accident Co. v. Industrial Accident Commission, 279 U. S. 109;
Warner v. Goltra, 293 U. S. 155.

CONCLUSION

WHEREFORE your Petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 12,397, Maryland Casualty Company, Appellant, v. Olive Ray Toups, individually and as next friend of Helena Estelle Toups, et al., Minors, Appellees, and that said judgment of the United States Court of Appeals for the Fifth Circuit may be reversed by this

Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

MARYLAND CASUALTY COMPANY,

By: ROSZEL C. THOMSEN,
Counsel for Petitioner,
1914 O'Sullivan Building,
Baltimore 2, Maryland.

CHARLES S. PIPKIN,
Beaumont, Texas,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ------

MARYLAND CASUALTY COMPANY,
(A Corporation),
Petitioner,

vs.

OLIVE RAY TOUPS,
individually and as next friend of
HELENA ESTELLE TOUPS and JOHN HENRY TOUPS,
Minors, and
HELENA ESTELLE TOUPS and JOHN HENRY TOUPS,
Minors,
Respondents,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINIONS OF THE COURT BELOW

The District Judge filed no opinion in the case. His charge appears in the Record at page 229. The opinion in the United States Court of Appeals for the Fifth Circuit will be reported in ..... Federal Reporter, Second Series, ..., and appears in the Record at pages 285 to 295.

II.

JURISDICTION

A statement with respect to jurisdiction has been given in the Petition, and in the interest of brevity, is not repeated at this point.

III.

STATEMENT OF THE CASE

A statement of the case has been given in the Petition, and in the interest of brevity, is not repeated at this point.

IV.

SPECIFICATIONS OF ERRORS

1. The District Court erred in refusing an instructed verdict in favor of Petitioner (R. 45, 58), in entering judgment for Cross-Plaintiffs, Respondents herein (R. 59) and in refusing Petitioner's Motion to Set Aside Judgment, etc. (R. 67, 275).

2. The Court of Appeals for the Fifth Circuit erred in affirming said judgment (R. 296).

3. The Courts below erred in applying the Workmen's Compensation Law of the State of Texas in this case and in entering and sustaining a judgment based upon that state law.

V.

ARGUMENT

The question involved in this case is concisely discussed by the Court of Appeals for the First Circuit in the recent case of Gahagan Construction Corporation v. Armao, 165 F. 2d 301 at 303 (cert. den. 333 U. S. 876), as follows:

> "The concept of local concern developed after Southern Pacific Co. v. Jensen, 1917, 244 U. S. 205, 137 S. Ct.

524, 61 L. Ed. 1086, L. R. A. 1918, 451, Ann. Cas. 1917E, 900, and subsequent cases, which propounded the doctrine that state workmen's compensation acts could not constitutionally be applied, even by state courts, to injuries incurred by maritime workers on navigable waters. Just when a matter is of local concern only so that the state law may be applied is a question that has long perplexed the courts. The only verbal test given in the cases is that if the employment has no direct relation to navigation and commerce, if state regulation will not prejudice the uniformity of the maritime law, then state laws may be applied and the general maritime jurisdiction abrogated. Millers' Indemnity Underwriters v. Braud, 1926, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470; Grant Smith-Porter Ship Co. v. Rohde, 1922, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008. No more definite test has been laid down, with resulting confusion in the lower federal courts. The constitutional basis of the Jensen case has been severely questioned, but the idea of an exclusive maritime law not subject to state law has never been repudiated by the Supreme Court. As late as 1941, the Court in Parker v. Motor Boat sales, 314 U. S. 244, 62 S. Ct. 221, 86 L. Ed. 184, stated that regardless of the constitutional basis of the Jensen and later decisions, Congress in the enactment of the Longshoremen's and Harbor Workers' Compensation Act had accepted them as defining the line between admiralty and state power.

"Some indication of what the Supreme Court considers to be of only local concern may be gathered from an examination of the decisions. Thus, a state workmen's compensation act may be applied to a carpenter injured while working on a ship which has been launched but not yet completed, Grant Smith-Porter Ship Co. v. Rohde, supra; to a diver employed by a shipbuilding company to remove obstructions in the course of a river, Millers' Indemnity Underwriters v. Braud, supra; to a longshoreman injured on land, Smith & Son v. Taylor, 1928, 276 U. S. 179, 48 S. Ct.

228, 72 L. Ed. 520; to a lumber inspector temporarily aboard a schooner checking a cargo of lumber being unloaded from another vessel, Rosengrant v. Havard, 1927, 273 U. S. 664, 47 S. Ct. 454, 71 L. Ed. 829; to a person trying to launch a small boat, Alaska Packers' Ass'n v. Industrial Accident Comm., 1928, 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656; to men engaged in logging operations, Sultan Ry. & Timber Co. v. Department of Labor, 1928, 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820; and to an engineer working on a barge dismantling a bridge, Davis v. Department of Labor, 1942, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246. On the other hand the general maritime law is controlling and state laws can not constitutionally be applied to stevedores injured on navigable waters, Minnie v. Port Huron Terminal Co., 1935, 295 U. S. 647, 55 S. Ct. 884, 79 L. Ed. 1631; Employers' Liability Assurance Corporation v. Cook, 1930, 281 U. S. 233, 50 S. Ct. 308, 74 L. Ed. 823; Northern Coal & Dock Co. v. Strand, 1928, 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. 232; Southern Pacific Co. v. Jensen, supra; State of Washington v. Dawson & Co., 1924, 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646; nor to repairmen working on ships. Baizley Iron Works v. Span, 1930, 281 U. S. 222, 50 S. Ct. 306, 74 L. Ed. 819; Robins Dry Dock & Repair Co. v. Dahl, 1925, 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed. 372; Gonsalves v. Morse Dry Dock Co., 1924, 266 U. S. 171, 45 S. Ct. 39, 69 L. Ed. 228.

"The Supreme Court has indicated that within a shadowy area where it is unclear which law should apply, if either the Longshoremen's Act or a state act is applied, the result will be upheld. See Davis v. Department of Labor, supra. But it should be noted that the overlap is between the federal compensation act and the state acts. It has not been suggested that the Jones Act and the State Acts overlap. In no case in the Supreme Court in which the injured person was a seaman performing a seaman's duties on navigable water, has state law been held applicable. Even those

members of the Supreme Court who customarily dissented in the application of the Jensen rule, concurred in holding state acts inapplicable where the injured person was a seaman covered by the Jones Act. See Employers' Liability Assurance Corporation v. Cook, supra, 281 U. S. at page 237, 50 S. Ct. 308, 74 L. Ed. 823; Northern Coal & Dock Co. v. Strand, supra, 278 U. S. at page 147, 49 S. Ct. 88, 73 L. Ed. 232. Summarily stated, their theory was that the Constitution itself did not prohibit state action in the silence of Congress, but after Congress had spoken there could be no state regulation."

Gahagan Construction Corporation v. Armao, 165 F. 2d 301 at 303.

The decedent in the case at bar was a seaman,

Opinion of Court of Appeals herein (R. 292);
Norton v. Warner, 321 U. S. 536;
Warner v. Goltra, 293 U. S. 155.

and was covered by the Jones Act (June 5, 1920) 41 Stat. 988, 1007 c. 250, 46 U. S. C. A. sec. 688, even though he fell from the dock into the water.

In the case of *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 87 L. Ed. at 602, this Court, speaking through Chief Justice Stone, said:

"The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. See Waring v. Clarke, 5 How. (U. S.) 441, 12 L. Ed. 226, and New Engle Mut. M. Ins. Co. v. Dunham, 11 Wall. (U. S.) 1, 20 L. Ed. 90, supra"

The Sabine Pass, in which the Relief No 1 customarily plied, is navigable water, and the navigable tidewater extended right up under the dock from which Toups fell.

The work of making the fenders for his boat, which Toups was engaged in when he fell off the dock and was drowned, was maritime work essential to the proper operation of his boat.

CONCLUSION

By the Merchant Marine Act—a measure of general application—Congress has occupied the field of injuries to and death of seamen arising out of their employment, and has provided certain remedies. No state statute can validly provide any other or different remedies. The case at bar is important because this Court has been zealous to preserve to seamen the benefit of the Jones Act and other exclusive features of the maritime law. The decision in this case disturbs the harmony and uniformity of that law and is in conflict with a decision of the First Circuit, as well as with the principles laid down by this Court. We respectfully submit that the petition should be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed.

ROSZEL C. THOMSEN,
Counsel for Petitioner,
1914 O'Sullivan Building,
Baltimore 2, Maryland.

CHARLES S. PIPKIN,
Beaumont, Texas,
Of Counsel.